Filed 2/28/19 S.L. v. Superior Court CA6

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

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| S.L.,<br><br>Petitioner,<br><br>v.<br><br>THE SUPERIOR COURT OF SANTA CRUZ COUNTY,<br><br>Respondent,<br><br>SANTA CRUZ COUNTY HUMAN SERVICES DEPARTMENT,<br><br>Real Party in Interest. | No. H046440<br>(Santa Cruz<br>Super. Ct. No. 18JU00209) |

Petitioner S.L. (Father), who is incarcerated in state prison, seeks extraordinary writ relief (Cal. Rules of Court, rule 8.452) from a dispositional order declaring his infant son, M.L., a dependent of the juvenile court. Proceeding in propria persona, Father contends that the court erred in bypassing reunification services and setting a permanency planning hearing under Welfare and Institutions Code section 366.26.[1] We find no error.

*Background*

Father and the minor's mother, A.L. (Mother), have been before this court several times. In the most recent of those proceedings, we upheld the juvenile court's finding

[1] All further statutory references are to the Welfare and Institutions Code.

that their four-year-old son, A.L., and five-year-old daughter, S.L., were adoptable and affirmed the order terminating the parental rights of both parents. During the pendency of that appeal (*In re A.L., et al.*; *Santa Cruz County HSD v. A.L., et al.* (H045964) [nonpub.opn.]), M.L. was born.

The Santa Cruz County Human Services Department (Department) filed a petition on September 4, 2018, alleging that two-week-old M.L. came within juvenile court jurisdiction under section 300, subdivisions (b)(1), (g), and (j). The Department stated that Mother had a "long history of substance abuse," including while pregnant with M.L. Father also had "a long history of criminal behavior and substance abuse"; he was currently incarcerated, rendering him unable to protect M.L. Furthermore, due to Father's incarceration he was unable to arrange for M.L.'s care or support, placing the infant at risk for harm and neglect.

The petition also summarized the history of neglect of M.L.'s oldest sibling, J.J., and later, S.L. and A.L., on each occasion resulting in orders terminating parental rights after services were unsuccessful in achieving reunification. Just four days before his scheduled delivery date, Mother's probation officer had conducted a home visit and found drug paraphernalia and garbage in various places in the home, and Mother appeared to be under the influence. According to the social worker's report one week after M.L.'s birth, testing revealed amphetamine and methamphetamine in M.L.'s meconium.

The juvenile court found that the Department had made a prima facie showing that M.L. was described by section 300 and that a substantial danger to his health required his removal from parental custody. Father was then in jail. On September 7, 2018, shortly after the detention order, the court ordered issuance of a protective custody warrant. Mother had been taken into custody and later released, but she was out of contact with

the Department.[2] The Department was notified on September 12 that the Watsonville police had found Mother, her sister, and M.L.; Mother claimed that she was unaware that the Department had been trying to contact her.

On October 1, 2018, in preparation for the October 9 jurisdictional hearing, the Department submitted a report recounting the criminal history of both parents and the history of juvenile court dependency involving M.L.'s older siblings, most recently S.L. and A.L. The Department asserted that M.L. was at risk due to Mother's continued abuse of controlled substances. In addition to a positive test for methamphetamine in March of 2018, Mother had been found with drug paraphernalia as late as August 8 (two weeks before M.L.'s birth), and on that occasion she appeared to law enforcement to be under the influence. She failed to appear for drug testing on August 28, August 31, and September 5, 2018.

The social worker further described an interview she had conducted with Father on August 28, 2018. At that point Father had been at the jail since November 2017, but he stated that he had been "working on himself" and had taken many classes in order to be a father to M.L. upon his release from jail. He said he had been clean and sober since November 2017; and as far as he knew, mother had been as well. If there was drug paraphernalia in the home, it probably belonged to the boyfriend of mother's sister. Father asked that M.L. be placed with the maternal grandmother. He was "willing to do anything in the world to reunify," and he stated that he was "very capable of caring for [M.L.]" He said that he could offer M.L. a stable place once he was no longer

[2] The person Mother had named as the baby's caretaker had informed the Department that she no longer had custody; the maternal aunt (Mother's twin sister, who had lost parental rights to her own child) had picked him up. The social worker believed that M.L. might be in the possession of Mother or her sister; each had a history of claiming to be the other.

incarcerated; but he also acknowledged that he needed to stay in a Sober Living Environment " 'to keep clean and do the right thing.' "

The Department was unwilling to offer reunification services to either parent, based on section 361.5, subdivisions (b)(10), (b)(11), and (b)(13). Mother had continued to struggle with substance abuse, notwithstanding her repeated assertions that she had been clean and sober since January of 2013. As to Father, the Department recommended bypass of services based on his substance abuse relapses, his long criminal history, and his current incarceration. His continuing to engage in criminal activity "impacts his ability to be available and protective of his children." One of his arrests had occurred the day after S.L. and A.L. were placed with him upon Mother's arrest during a probation search. His release date was unknown, as he had not yet been sentenced.

M.L. had been in foster care since September 12, 2018 and was doing well in his placement. However, both parents were permitted weekly visits by the court's detention order, and those visits had been successful.

In her addendum report, filed on November 2, 2018, the social worker noted that the maternal grandmother had requested placement of M.L. with her, but the Department opposed the request as unsafe for the infant. During J.J.'s dependency the grandmother had permitted unauthorized and unsupervised contact between Mother and J.J. The maternal grandmother had also allowed unsupervised contact between Mother's sister and the sister's daughters while they were in the grandmother's care.

A combined jurisdiction and disposition hearing took place on December 3, 2018. Father appeared by telephone from San Quentin State Prison. The social worker testified, as did Mother, who insisted that M.L. should not have been removed from her.

The Department decided not to pursue subdivision (g) of section 300, based on the state of the evidence. It argued, however, that M.L. would not be safe in Father's care because of Father's criminal behavior and drug abuse problem. And Father's failure to reunify with S.L. and A.L. made him subject to bypass under section 361.5,

subdivisions (b)(10) and (b)(11). The "hard part," county counsel argued, was that he had those children in his care, but "he couldn't stay off the methamphetamine." Being incarcerated thereafter made it "hard for him to make reasonable efforts" to address his substance abuse problem. Like Mother, Father had resisted treatment by using drugs after obtaining treatment, within the meaning of section 361.5, subdivision (b)(13).

The minor's attorney, Robert Patterson, urged the court to bypass services to Mother based on her continuing addiction to methamphetamine. As to Father, Patterson said he had "rooted for him and went to bat for him to get reunification services" in S.L. and A.L.'s case, only to see that case fall apart, and he did not want to see this newborn experience that "roller coaster." Patterson represented that Father was "not going to be able to parent anybody for at least another year, and what happens to [M.L.] in the interim?" Patterson thus urged the court to give M.L. "a fresh start, and his most developmental and productive years . . . in a drug-free environment."

At the conclusion of the hearing the court sustained the allegations of the Department's petition pertaining to subdivisions (b) and (j) of section 300.[3] In its

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[3] A finding that section 300, subdivision (b), applies may be based on a determination that "(1) The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child, or the willful or negligent failure of the child's parent or guardian to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left, or by the willful or negligent failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment, or by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse. . . . The child shall continue to be a dependent child pursuant to this subdivision only so long as is necessary to protect the child from risk of suffering serious physical harm or illness."

Subdivision (j) of this section is applicable when "[t]he child's sibling has been abused or neglected, as defined in subdivision (a), (b), (d), (e), or (i), and there is a substantial risk that the child will be abused or neglected, as defined in those subdivisions. The court shall consider the circumstances surrounding the abuse or neglect of the sibling, the age and gender of each child, the nature of the abuse or neglect of the

disposition order, the court adopted the recommendation of the Department to bypass reunification services for the parents, finding by clear and convincing evidence that it would not be in M.L.'s best interests to provide services. Referring specifically to Father, the court denied reunification services based on the finding, by clear and convincing evidence, that he met the bypass criteria of section 361 .5, subdivisions (b)(10), (b)(11), and (b)(13).

The court then set a selection and implementation hearing within 120 days, to be held on March 26, 2019. The court granted Mother supervised visitation once per month. Father was not to have visitation as long as he was at San Quentin State Prison; but if he were to be released, or moved to a facility allowing face-to-face visits, he would be afforded supervised visits once or more per month.[4]

*Discussion*

In his petition Father contends that he should have been allowed services in order to "reunify" with M.L. He advises us that he took parenting classes while at the Rountree facility and has proof of participation in the "Papás"[5] program. He states that he has been in "AA NA meetings 3 times a week for the past year" and has been in substance abuse

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sibling, the mental condition of the parent or guardian, and any other factors the court considers probative in determining whether there is a substantial risk to the child."

[4] The record contains a minute order indicating that on October 19, 2018, Father was sentenced to two years for violating Penal Code section 530.5, subdivision (a), unauthorized use of another's personal identifying information. A two-year sentence enhancement was also imposed under Penal Code section 12022.1 for committing the offense while released from custody before final judgment on a prior felony. Thus, Father was ordered to serve a total term of four years in prison, with a credit of 660 days.

[5] Papás defines itself as "a program that supports positive father involvement in the family and the community, by providing family development advocacy and psycho-educational groups and classes to help fathers improve their parenting skills, quality of the relationships, and communication." The record contains verification of father's participation in the program from January 10 to April 18 2018. A certificate of his participation in the Hands on Fatherhood class there covered January 10 to April 11, 2018.

classes with certificates to prove it. He further states that he "had nothing to do with any neglect."

"Subdivision (a) of section 361.5 sets forth the general rule that a parent whose child has been removed in a dependency proceeding must be afforded reunification services." (*Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 753, superseded by statute on another point as stated in *Renee J. v. Superior Court* (2002) 96 Cal.App.4th 1450, 1457.) "While the overarching goal of the dependency law is to safeguard the welfare of dependent children and to promote their best interests [citations], the law's first priority when dependency proceedings are commenced is to preserve family relationships, if possible. [Citation.] To this end, the law requires the juvenile court to provide reunification services unless a statutory exception applies. [Citations.]" (*In re K.C.* (2011) 52 Cal.4th 231, 236.) "The importance of reunification services in the dependency system cannot be gainsaid. The law favors reunification whenever possible. [Citation.] To achieve that goal, ordinarily a parent must be granted reasonable reunification services. . . . But reunification services constitute a benefit; there is no constitutional ' "entitlement " ' to those services. [Citation.]" (*In re Aryanna C.* (2005) 132 Cal.App.4th 1234, 1242.)

The exceptions to reunification services are listed in the bypass provisions in section 361.5, subdivision (b). Relevant here are subdivisions (b)(10), (b)(11), and (b)(13).[6] When any one of these exceptions applies, "[t]he court *shall not* order

[6] These provisions denote the following conditions found applicable in the court's denial of services in M.L.'s case: "(10) That the court ordered termination of reunification services for any siblings or half siblings of the child because the parent or guardian failed to reunify with the sibling or half sibling after the sibling or half sibling had been removed from that parent or guardian pursuant to Section 361 and that parent or guardian is the same parent or guardian described in subdivision (a) and that, according to the findings of the court, this parent or guardian has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling of that child from that parent or guardian. [¶] (11) That the parental rights of a parent over

reunification . . . unless the court finds, by clear and convincing evidence, that reunification is in the best interest of the child." (§ 361.5, subd. (c)(2), italics added.) In such a case "the general rule favoring reunification is replaced by a legislative assumption that offering services would be an unwise use of governmental resources." (*In re Baby Boy H.* (1998) 63 Cal.App.4th 470, 478; see also *In re Rebecca H.* (1991) 227 Cal.App.3d 825, 837 [statute represents Legislature's recognition that "it may be fruitless to provide reunification services under certain circumstances"]; accord, *In re G.L.* (2014) 222 Cal.App.4th 1153, 1163-1164.)

In this case, the court found by clear and convincing evidence that both parents had "an extensive history of chronic drug use and that they have resisted prior court-ordered treatment for this problem during the three-year period immediately prior to the filing of the petition." As to Father, the court supported this point by noting Father's arrest in the fall of 2017 with methamphetamine and drug paraphernalia in his possession.[7] Thus, notwithstanding the provision of reunification services for him during S.L. and A.L.'s dependency, Father had evidently not "overcome the substance abuse issue, which is very key to this Court."

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any sibling or half sibling of the child had been permanently severed, and this parent is the same parent described in subdivision (a), and that, according to the findings of the court, this parent has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling of that child from the parent. . . . [¶] (13) That the parent or guardian of the child has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brought that child to the court's attention, or has failed or refused to comply with a program of drug or alcohol treatment described in the case plan required by Section 358.1 on at least two prior occasions, even though the programs identified were available and accessible." (§ 361.5, subd. (b).)

[7] In noting this arrest, the court was evidently referring to a citation in October 2017 for possession of drug paraphernalia and two arrests, a week apart, in November 2017. (*S.L. v. Superior Court* (Apr. 27, 2018, H045515) [nonpub. opn.], at pp. 6-5.)

In its written order the court expressly found clear and convincing evidence of the following three conditions: (1) that reunification services for M.L.'s siblings (S.L. and A.L.) had been terminated because the parents had failed to reunify with those children after their removal from parental custody, and the parents had not made a reasonable effort to treat the problems that led to the removal of those siblings (§ 361.5, subd. (b)(10)); (2) that the parental rights to S.L. and A.L. had been permanently severed, and the parents had not made a reasonable effort to treat the problems that led to the removal of those siblings (§ 361.5, subd. (b)(11)); and (3) that each parent had "a history of extensive, abusive, and chronic use of drugs or alcohol" and had resisted prior court-ordered treatment for this problem during the three-year period immediately prior to the filing of the petition that brought M.L. to the court's attention (§ 361.5, subd. (b)(13)). Father does not contest these findings, and substantial evidence supports them.

"[T]he party seeking bypass of reunification services under section 361.5, subdivision (b) has the burden of proving that reunification services need not be provided," a showing that must be made by clear and convincing evidence. (§ 361.5, subd. (b); *In re Angelique C.* (2003) 113 Cal.App.4th 509, 521 (*Angelique C.*); see Evid. Code, § 500.) However, once the court makes a finding that a bypass provision specified in section 361.5, subdivision (c)(2), applies,[8] the burden of proof shifts to the parent to establish affirmatively that reunification nevertheless would be in the best interest of the child. (See *In re Z.G.* (2016) 5 Cal.App.5th 705, 721; *In re William B.* (2008) 163 Cal.App.4th 1220, 1227 (*William B.*).) "A court called upon to determine whether reunification would be in the child's best interest may consider a parent's current efforts and fitness as well as the parent's history. [Citation.] Additional factors for the

[8] Subdivision (c)(2) of section 361.5 is applicable here. It states, in pertinent part: "The court shall not order reunification for a parent or guardian described in paragraph . . . (10), (11), . . . [or] (13) . . . of subdivision (b) unless the court finds, by clear and convincing evidence, that reunification is in the best interest of the child."

juvenile court to consider when determining whether a child's best interest will be served by pursuing reunification include the gravity of the problem that led to the dependency; the strength of the relative bonds between the child and both the parent and caretakers; and the child's need for stability and continuity, which is of paramount concern." (*In re S.B.* (2013) 222 Cal.App.4th 612, 622-623, citing *In re Ethan N.* (2004) 122 Cal.App.4th 55, 66-68.)

"A juvenile court has broad discretion when determining whether . . . reunification services would be in the best interests of the child under section 361.5, subdivision (c). [Citation.]" (*William B., supra*, 163 Cal.App.4th at p. 1229.) "As a reviewing court, we will reverse a juvenile court's order denying services only if that discretion has been clearly abused." (*Angelique C., supra*, 113 Cal.App.4th at pp. 523-524.) In other words, we will not disturb such a discretionary decision unless the lower court made "an arbitrary, capricious, or patently absurd determination." (*Adoption of D. S. C.* (1979) 93 Cal.App.3d 14, 24-25.) Furthermore, when the party with the burden of proof (i.e., Father in this case) fails to meet his or her burden, upon appellate review the question "becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support [the] finding.' [Citation.]" (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528 (*I.W.*).) The same standards direct our review in a proceeding under California Rules of Court, rule 8.452.

Even given a liberal construction of his petition, as required by California Rules of Court, rule 8.452(a)(1), Father has not met his burden. He offers no justification for disregarding the statutory exceptions to reunification, much less any factors indicating that M.L.'s best interests will be served by the Department's pursuing unification with his incarcerated parent. Even visitation is precluded as long as Father remains in

San Quentin. Indeed, the timeline with a child under three years old is especially short, given that "[f]or a child under three years of age at the time of removal . . . reunification services are presumptively limited to six months." (*Tonya M. v. Superior Court* (2007) 42 Cal.4th 836, 843; see § 361.5, subd. (a)(1)(B), § 366.21, subd. (e)(3).) "[T]here must be some 'reasonable basis to conclude' that reunification is possible before services are offered to a parent who need not be provided them," and "at least part of the best interest analysis must be a finding that further reunification services have a likelihood of success." (*William B., supra,* 163 Cal.App.4th at pp. 1228-1229.) Because the Legislature has decided that parents who fall under section 361.5, subdivision (b), are unlikely to benefit from reunification services, the court properly gave priority to this infant's interest in a timely establishment of a stable, permanent plan rather than family unification.

*Disposition*

The petition for extraordinary writ is denied.

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ELIA, ACTING P. J.

WE CONCUR:

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BAMATTRE-MANOUKIAN, J.

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MIHARA, J.

*S.L. v. Superior Court*
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